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No. 91-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
FEDERAL STATUTES INVOLVED	iv
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
I. Introduction	5
II. The Petition Should Be Denied Because the Decision Below Will Have Little if Any Application Outside of This Case	5
III. The Petition Should Be Denied Because the Decision of the Court of Appeals Does Not Conflict with Decisions of This Court or Any Circuit Court	8
CONCLUSION	15
UNION RESPONDENT APPENDIX A	A-1

TABLE OF AUTHORITIES

CASES:	PAGE
Airline Pilots Int'l Ass'n v. O'Neill, 111 S.Ct. 1127 (1991)	11, 12
Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)	7, 9, 10
Anderson v. Alpha Portland Indus., Inc., 727 F.2d 177 (8th Cir. 1984)	10
Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986)	13
Buchholzt v. Swift, 609 F.2d 317 (8th Cir. 1979)	13
Electrical Workers v. Foust, 442 U.S. 42 (1979)	11
Florida Power & Light Co. v. Electrical Workers, 417 U.S. 790 (1974)	7
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	9, 12
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)	11, 14
Humphrey v. Moore, 375 U.S. 335 (1942)	11
Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329 (3d Cir. 1985)	14
Pennsylvania Railroad Co. v. Day, 360 U.S. 548 (1959)	13, 14
Teamsters v. Terry, 494 U.S. 558 (1990)	11
United Automobile Workers v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983)	7
Vaca v. Sipes, 386 U.S. 171 (1967)	10

ADMINISTRATIVE DECISIONS:

Steelworkers Local Union No. 2869, 239 NLRB 982 (1978) 13

FEDERAL STATUTES:

28 U.S.C. Sec. 1254(1) ..... iv, 5

29 U.S.C. Sec. 152(3) ..... iv, 6

29 U.S.C. Sec. 159(a) 9

Sup. Ct. R. 10.1(a)(c) ..... iv, v, 4, 5

PERIODICALS AND TREATISES:

1B J. Moore & J. Lucas, *Moore's Federal Practice*, Par. O. 405[1] (2d ed. 1984) 3

Restatement (Second) of Judgments, Sec. 83(2)(d), comment (e) (1981) 3

FEDERAL STATUTES INVOLVED

28 U.S.C. Sec. 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

29 U.S.C. Sec. 152(3)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. Sec. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Supreme Court Rule 10.1(a)(c)

Considerations Governing Review On Writ Of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and

important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881 ("Local 881" or "Union") herewith files its Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by Jewel Food Stores, a Division of Jewel Companies, Inc. ("Jewel").

COUNTER-STATEMENT OF THE CASE

Jewel has filed this Petition for a Writ of Certiorari naming both Kelly Merk, et al. ("Merk Respondents") and Local 881 as co-respondents.[1] As Jewel notes, this Petition seeks review of two decisions of the Seventh Circuit Court of Appeals. The first decision is reported at 848 F.2d 761 (7th Cir. 1988) ("*Merk I*") (Pet. Appendix A, pp. A-1 to A-13); the other is reported at 945 F.2d 889 (7th Cir. 1991) ("*Merk II*") (Pet. Appendix B, pp. B-1 to B-34). Only *Merk I* impacts on the Union and the duty of fair representation questions raised by Jewel.

Both *Merk I* and *Merk II* arose out of a grievance settlement between Jewel and Local 881. That grievance began in 1984 when Jewel cut employees' wages. Jewel claimed it acted pursuant to an oral agreement allowing it to make the wage cuts. Local 881 denied that any such agreement existed.

In addition to a grievance, Local 881 filed an unfair labor practice charge and a lawsuit to enforce its collective bargaining agreement. In June, 1985, Local 881 and Jewel entered into a settlement resolving the dispute between them. Under the terms of this settlement, Jewel agreed to restore wages to their pre-cut level and to provide retroactive back pay covering almost all of the losses suffered by the then active employees. Jewel offered noth-

[1] To avoid confusion, we note that the interests of Local 881 and the Merk Respondents are not aligned. The Merk Respondents were the plaintiffs below. Local 881 was a co-defendant with Jewel in *Merk I*. Therefore, Local 881 and the Merk Respondents are not truly co-respondents but, rather, are individual respondents to Jewel's Petition.

ing to those employees who left Jewel's employment between the initial wage cut and the effective date of the settlement. These employees constitute the class of Merk Respondents. Local 881 accepted the proposed settlement. The Merk Respondents thereafter filed suit claiming that Jewel had breached its collective bargaining agreement by cutting wages, and that the Union had violated its duty of fair representation by entering into a settlement that did not obtain compensation for the former employees.

In *Merk I*, the Seventh Circuit affirmed the district court's conclusion that the Union did not owe a duty of fair representation to the Merk Respondents since they had ceased to be employees of Jewel at the time of the grievance settlement. Inasmuch as the district court and the Seventh Circuit concluded that the Union did not owe a duty of fair representation to the Merk Respondents, Local 881 was dismissed as a defendant from this lawsuit. Thereafter, Jewel filed an interlocutory Petition for a Writ of Certiorari. This Court denied that Petition at 488 U.S. 956 (1988).

Since the Court of Appeals in *Merk I* affirmed the district court's dismissal of Local 881, it did not participate in the trial which subsequently took place between Jewel and the Merk Respondents. In its Statement of the Case, Jewel makes certain factual assertions which are based on findings at trial—a trial in which Local 881 did not participate. To the extent that Jewel's factual assertions rely on such findings, Local 881 does not adopt these factual claims and is not bound by them. 1B *Moore's Federal Practice*, Par. O. 405[1] (2d ed. 1984); Restatement (Second) of Judgments, Sec. 83(2)(d), comment (e)(1981).

Specifically Local 881 denies that there ever was an oral agreement between Local 881 and Jewel allowing Jewel

to engage in unilateral wage reductions. (Petition, p. 2) Local 881 denies that there was an agreement for an economic reopener. (*Id.*) Nor did Local 881 insist that any agreement contained in the collective bargaining agreement be left to an oral understanding. (*Id.*) Finally, Local 881 did not fail to disclose to its general membership the purported oral understanding which Jewel contends the parties reached and which Local 881 denies. (*Id.*)

Should this Court decide to reverse the decision in *Merk I* concerning the duty of fair representation, and to the extent that these facts are material to the outcome of any subsequent case against Local 881, Local 881 would insist on a new trial in order to exercise its right to present its position to a trier of fact.

SUMMARY OF THE ARGUMENT

The Union contends that this is not an appropriate case for a grant of a Writ of Certiorari because: (1) the Court of Appeals' decision in *Merk I* is narrowly tailored to the parties' arguments and litigation strategies which is unlikely to bind other parties or have a substantial effect on future cases. Consequently, the Court of Appeals in *Merk I* has not "decided an important question of federal law which has not been, but should be settled by this Court". S. Ct. R. 10.1(a). (2) The *Merk I* decision correctly held that the Union did not owe a duty of fair representation to the former employees—the Merk Respondents. Accordingly, the decision in *Merk I* is not in conflict with the applicable decisions of this Court or any other United States court of appeals. S. Ct. R. 10.1(a)(c).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

Jewel seeks review of two decisions of the Seventh Circuit pursuant to 28 U.S.C. Sec. 1254(1). This Brief in Opposition to the Petition concerns itself only with the decision of the Court of Appeals in *Merk I* and, specifically, with the issue of whether the Union owed a duty of fair representation to the Merk Respondents who were former employees of Jewel and former members of the Respondent Union.

It is well established that this Court will not review a decision on certiorari as "a matter of right", but only as a matter of "judicial discretion" and for "special and important reasons." Sup. Ct. R. 10.1. The discretionary granting of certiorari enables this Court to effectively manage its docket and enormous case loads. This Petition should be denied because the decision of the Court of Appeals is neither in conflict with any decision of this Court or another court of appeals on the same matter, nor did the Court of Appeals decide "an important question of federal law which has not been, but should be, settled by this Court . . .". Sup. Ct. R. 10(a) and (c). On the contrary, the Seventh Circuit's decision in *Merk I* is extremely narrow and entirely consistent with this Court's "applicable decisions."

II. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW WILL HAVE LITTLE IF ANY APPLICATION OUTSIDE OF THIS CASE.

Jewel's Petition depicts the Court of Appeals' ruling in *Merk I* finding that the Union did not owe a duty to the

Merk Respondents as posing a significant threat to the stability of industrial relations and the system of exclusive representation. (Petition, p. 24) This characterization is a wild exaggeration of the Court of Appeals' limited opinion which was carefully tailored to the particular situation here. Specifically, the opinion explicitly rests on the parties' agreement that the Merk Respondents, as former employees, would *not* be considered "employees" under Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. Sec. 152(3). (*See* Pet. Appendix A, p. A-10) ("[w]e follow the parties' lead in assuming that the 2,000 former workers are not statutory 'employees'—without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.")

Similarly, the Court of Appeals found that the parties did not raise the issue of the Union voluntarily assuming a duty of fair representation and the former workers assenting to the Union's assumption of such a duty to represent them. (Pet. Appendix A, p. A-11 ("Again, however, the parties have not discussed whether the former employees assented to representation by the Union . . .".) *See* also Pet. Appendix A, p. A-13 ("Nonetheless, the parties' failure to make arguments that might have avoided this consequence leaves us with little choice.")

Jewel claims in its Petition that the Court of Appeals ". . . erroneously dismissed a claim alleging precisely such a violation". (Petition, p. 23) However, the Record does not support such an assertion. Jewel in its *Petition for Rehearing and Suggestion for Rehearing In Banc* to the Seventh Circuit and filed in 1986 after *Merk I* acknowledged that it had not previously raised such a claim. (The relevant parts of Jewel's Petition for Rehearing are attached hereto as Union Respondent Appendix A, hereinafter "Un. Resp. Appendix A"). There, Jewel claimed that it did raise the "assumption" and "assent" arguments:

> Finally, the panel indicated that perhaps if the parties had argued that the Union's authority to bind Plaintiffs was unrelated to the duty of fair representation, then the acknowledged disastrous consequences of its holding might have been avoided, and a different result reached.
>
> Jewel can only submit *that such an argument is simply a more general way of stating that which it did argue*; if the broader argument leads to one holding, the narrower argument cannot lead to a different holding. (emphasis supplied)

(Un. Resp. Appendix A, p. A-3)

As Jewel admits in the above passage, it considers the "assumption" and "assent" species of duty of fair representation matters to be identical to the more typical cases involving the duty of fair representation as an automatic consequence of exclusive representation. As the Court of Appeals in *Merk I* pointed out, however, these are separate doctrines. (Pet. Appendix A, pp. A-10 - 11, citing *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 812-13 (1974); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, n. 20 (1971); *United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1484 (6th Cir. 1983)).

Clearly, Jewel failed to raise this separate argument at the appropriate time. The *Merk I* court found that this precluded consideration of this separate argument on appeal. In this Petition, Jewel *does not* raise this conclusion as a separate error warranting review. Accordingly, Jewel has long since waived this argument.

The Court of Appeals expressly narrowed its holding by finding that its conclusions were a necessary product of the parties' litigation strategy. The precedential value of the decision below is thus, to say the least, extremely

limited. A decision that rests so entirely on various assumptions of law by the parties—and thus binds virtually no one other than the parties—is certainly not worthy of this Court's consideration.

III. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY CIRCUIT COURT.

In deciding that the Union does not owe a duty of fair representation to the Merk Respondents, the Seventh Circuit properly relied on this Court's decision in *Pittsburgh Plate Glass* which established that Sec. 2(3) of the NLRA excluded retirees and other former workers from its definition of employees. (Pet. Appendix A, pp. A-10 - 11). The Court of Appeals found that the Merk Respondents lost their status as statutory "employees" when they quit Jewel's employment "for reasons other than a labor dispute or unfair labor practice" and, thereby, concluded, that, "[A] union need not represent non-employees." (Pet. Appendix A, p. A-10).

The Seventh Circuit's holding is perfectly consistent with *Pittsburgh Plate Glass* wherein this Court held that Section 2(3) of the NLRA, defining statutory "employees", includes only those who are actively employed. As this Court held:

> The Act, after all, as Section 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective bargaining rights of 'workers'—not those who have retired from the work force. . . . Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective bargaining obligations of the statute.

> To the contrary, the legislative history of Section 2(3) itself indicates that the term "employee" is not to be stretched beyond its plain meaning embracing only those who work for another for hire.

404 U.S. at 166.

This Court's decision in *Pittsburgh Plate Glass* is grounded, as well, on Section 9(a) of the NLRA, 29 U.S.C. Sec. 159(a), which "accords representative status only to labor organizations selected by the majority of employees in a 'unit appropriate' 'for the purposes of collective bargaining'." 404 U.S. at 171. The Court concluded that retirees were not "employees" included in any bargaining unit and wrote:

> The unit determined by the Board to be appropriate was composed of "employees of the Employer's plant . . . working on hourly rates, including group leaders who work on hourly rates of pay . . ." Apart from whether retirees could be considered "employees" within this language, they obviously were not employees "working" or "who work" on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, *it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.* (emphasis supplied)

404 U.S. at 172.

Section 9(a) of the NLRA has also been relied on by this Court in defining the scope of a union's duty of fair representation. Beginning with *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), this Court has consistently held that a union's exclusive grant of representation under Section 9(a) "is not absolute" and is tempered by a union's "honest effort to serve the interests of all of those **members**, without hostility to any." (emphasis supplied) Thus, this Court has concerned itself only with the union's obli-

gation and duty to represent "members" of a particular bargaining unit. This principle was later reaffirmed in *Vaca v. Sipes*, 386 U.S. 171 (1967) wherein this Court wrote:

> Under this doctrine, the exclusive agent's statutory authority to represent **all members of a designated unit** includes a statutory obligation to serve the interests of **all members** without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. (emphasis supplied)

386 U.S. at 177.

* * *

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a **member of the collective bargaining unit** is arbitrary, discriminatory, or in bad faith." (emphasis supplied)

386 U.S. at 190.

This same rationale was relied on in *Pittsburgh Plate Glass* wherein the Court wrote:

> Since retirees are not **members of the bargaining unit, the bargaining agent is under no statutory duty** to represent them in negotiations. . . . [T]he case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those it does represent. (emphasis supplied)

404 U.S. at 181, n. 20.

See also, *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 181 (8th Cir. 1984) ("[T]he union owes no duty of fair representation to retirees since the union's duty runs only to employees within the bargaining unit for whom it acts as the exclusive bargaining representative.")

Thus, this Court has consistently described the scope of the union's grant of exclusive representation and the concomitant duty of fair representation as extending only to bargaining unit members, and never as including former employees, or non-members of a bargaining unit. See, e.g., *Teamsters v. Terry*, 494 U.S. 558 (1990); *Electrical Workers v. Foust*, 442 U.S. 42 (1979); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

As *Pittsburgh Plate Glass*, *Vaca* and their progeny teach, the duty of fair representation does not last forever and does not extend to all persons, since it clearly does not reach retirees or other non-employees. Such a proposition is completely consistent with the rationale upon which this Court constructed the duty of fair representation doctrine. The duty of fair representation is the **quid pro quo** for the union's authority under Section 9(a) of the NLRA to exclusively represent bargaining unit members. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). Conversely, once an employee leaves the bargaining unit and the union ceases to have exclusive representational authority, the duty of fair representation must also end. Neither this nor any other court has ever held that either the power to act as exclusive representative nor the correlative duty to represent fairly, extends beyond Section 2(3) employees.

Jewel argues that the Union owes a duty to the Merk Respondents because, at the time the grievances arose, they "were subject to exclusive grievance and arbitration machinery established pursuant to the collective bargaining agreement." (Petition, pp. 20-21) Jewel's argument misses the point since Jewel focuses its analysis on the time the grievance arose. The issue of the existence of the duty of fair representation must focus on the relationship of the parties at the time of the alleged violation of the duty. As stated in *Airline Pilots Ass'n Int'l v. O'Neill*, 111 S.Ct. 1127 (1991):

> [A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so outside a 'wide range of reasonableness' *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), as to be irrational.

The same rationale for not affirmatively extending the Union's duty of fair representation to retirees applies to the Merk Respondents who voluntarily chose to sever their relationship from Jewel and the Union, even while the Union was attempting to enforce their contractual rights.

Once the Respondents voluntarily chose not to remain employees and bargaining unit members, the Union's status as exclusive representative and, therefore, the very foundation of the Union's duty of fair representation vanished. The Merk Respondents, in effect, stated that they no longer wanted the Union to represent them, no longer would pay dues and would no longer participate in union affairs such as contract ratification and the election of union officers. Their right to reject the Union through the NLRB's decertification process also ended. By virtue of their decision, the Merk Respondents removed themselves from the system of exclusive representation. They quite simply could no longer exercise their power to determine how the Union should function, or whether there should be any union at all. Conversely, the Union was no longer compelled by their power as members of the bargaining unit to shape the Union's decisions to conform to the former employees' interests.

Under these circumstances, to impose on the Union a duty of fair representation to the Merk Respondents would be unfair to both the Union and the former employees. The result would be that the Union would have to balance the interests of active employees against former employ-

ees even though the latter group has no ongoing interest in the bargaining relationship, cannot politically influence the Union, and cannot act to repudiate the Union should the Union's decisions not conform to the wishes of this group. Conversely, the former employees would be subject to the Union's decisions even though they no longer have any political or representational influence on the Union. This is the conflict which the district court herein sought to avoid. (Pet. Appendix C, p. C-8.)[2]

To accept Jewel's position would force unions into decisions that would be bad for both current and former bargaining unit members. This case represents a perfect example since Jewel presented the Union with the Hobson's choice of accepting a settlement favorable to current bargaining unit members but excluding former employees, or having no settlement at all. (Pet. Appendix C, p. C-4). Not surprisingly, the Union chose the former option. Now, Jewel wishes to have the Union exposed to liability because it followed the natural path of giving priority to the interests of those whom it was legally obligated to represent.

Pennsylvania Railroad Co. v. Day, 360 U.S. 548 (1959), the case primarily relied on by Jewel, is simply inapposite. That case concerned a question of whether the federal

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[2] The Union contends that, even should a duty of fair representation be found in this case, it did not violate the duty. To the contrary, Local 881 argues that nothing in duty of fair representation law prohibits a union from distinguishing between former and current employees when compromising a claim against an employer. See *Buchholzt v. Swift*, 609 F.2d 317, 325-27 (8th Cir. 1979); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir. 1986). See also *Steelworkers Local Union No. 2869*, 239 NLRB 982 (1978) (Union did not violate duty by obtaining grievance settlement benefitting only those who were active employees at the time of settlement).

courts or the National Railroad Adjustment Board had jurisdiction in an action under a collective bargaining agreement in the railroad industry. Although the plaintiff in *Day* was a former railroad employee, the jurisdictional issue did not depend in any way on the status of the plaintiff as a current or former employee. *Day*, 360 U.S. at 551-52. In contrast, here, the issue of whether a duty of fair representation exists has everything to do with whether an individual is a member of a bargaining unit or not.

Similarly, *Hines v. Anchor Motor Freight, supra.*, another case relied on by Jewel, is also a vastly different matter. That action concerned an employer's claim that the finality of the arbitration process immunized the employer against liability in a duty of fair representation case. Quite clearly, the issues in *Hines* had nothing whatsoever to do with the issue involved in the instant matter. There simply was no question in *Hines* as to whether the union owed a duty to the plaintiff. However, that is the threshold issue in our case.

Finally, Jewel relies on *Koshatka v. Philadelphia Newspaper, Inc.*, 762 F.2d 329 (3rd Cir. 1985) in support of its proposition that the Union assumed a duty to the Merk Respondents. The court in *Koshatka* emphasized that the plaintiff had voluntarily submitted his grievance to the union. As noted previously, the Court of Appeals in *Merk I* found that Jewel had not raised the assumption and assent argument. (Pet. Appendix A, p. A-11.) Jewel does not appeal from this aspect of the Court of Appeals' decision, nor does Jewel provide any record citation establishing that it did raise this argument at the appropriate time. Therefore, Jewel is precluded from relying on the *Koshatka* doctrine involving the assumption of a duty by a union which would otherwise not have one. Moreover,

Koshatka involved litigation over the inclusion in the bargaining unit of a **current** employee. This question is a far different one from the one raised by this case. Here, everyone agrees that the Merk Respondents were not employees at the time of the alleged breach.

In sum, the decision of the Court of Appeals in *Merk I* rests firmly on the applicable precedent established by this Court. It does not conflict with the decisions of any other circuit court. Jewel's Petition fails to lay the basis for a grant of a Writ of Certiorari.

CONCLUSION

For the reasons stated above, Respondent, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881, respectfully requests that this Court deny Jewel's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In The
United States Court of Appeals
For the Seventh Circuit

No. 86-2723

KELLY MERK, et al.,

Plaintiffs-Appellees,

v.

JEWEL FOOD STORES, A Division of Jewel Companies, Inc.,

Defendant-Appellant,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Defendant-Appellee.

Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

No. 85 C 7876

Honorable Marvin E. Aspen, Presiding

DEFENDANT-APPELLANT JEWEL FOOD STORES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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never before been thought sufficient to constitute a breach of the duty of fair representation.

Finally, the panel indicated that perhaps if the parties had argued that the Union's authority to bind Plaintiffs was unrelated to the duty of fair representation, then the acknowledged disastrous consequences of its holding might have been avoided, and a different result reached. (Slip. Op., p. 13)

Jewel can only submit that such an argument is simply a more general way of stating that which it did argue; if the broader argument leads to one holding, the narrower argument cannot lead to a different holding.

The Union did negotiate on behalf of Plaintiffs with respect to settlement of the grievance brought while they were employed; the settlement was intended by all concerned to bind them, and Plaintiffs never indicated to the contrary. Jewel argued that these facts precluded Plaintiffs from now bringing an individual lawsuit against the Company for breach of the labor contract.

If the Union had the authority to bind Plaintiffs even though it did not have a duty to represent them fairly, as apparently this panel would maintain, then the mere fact that Jewel argued that the Union did have a duty to conduct such representation fairly (and had complied with said duty), cannot lead to a different result.
